LEE CHEE MENG

v.

PUBLIC PROSECUTOR

SUPREME COURT, KUALA LUMPUR
HASHIM YEOP SANI CJ (MALAYA)
HARUN HASHIM SCJ
GUNN CHIT TUAN SCJ
[SC CRIMINAL APPEAL NO. 05-155-90]
27 JANUARY 1992

EVIDENCE: *Doubt as to identity of exhibit - Chain of evidence unsatisfactory - No evidence as to total weight of drugs - Whether exclusive use - Duty of prosecution - Dangerous Drugs Act 1952, ss. 37(b), (d), (da), 39B(1)(a), 39B(2).*

The appellant was convicted on a charge of trafficking in dangerous drugs under s. 39B(1)(a) of the Dangerous Drugs Act 1952. The trial Judge has found that the prosecution had successfully invoked the presumption of "occupier" under s. 37(b) of the Dangerous Drugs Act. His Honour also held that the prosecution could invoke s. 37(d). This is the appeal of the appellant.

Held:

[1] There were various aspects of evidence which were unsatisfactory, namely:

(a) there was no evidence as to the weight of the 10 packets of drugs found in the vanity case of the appellant's girl friend. As the total weight of heroin and morphine in this case was only 8.71 gms above the statutory limit of s. 37(da)(iiia), the weight of the 10 packets of drugs is crucial to sustain the charge against the appellant;

(b) the chain of evidence of the exhibits relating to the drugs was unsatisfactory. There was no search list to assist the prosecution although reference was made to it by PW6, the investigating officer; furthermore, there were various discrepancies by the prosecution witnesses as to the total number of packets of drugs involved;

(c) there was no conclusive evidence that the apellant had exclusive use of the room in which the offending drugs were found and

(d) the learned trial Judge did not consider the evidence of Y, the tenant of the other room, who was also arrested at the same time with four packets of drugs found in the room.

[2] Where there is a serious doubt as to the identity of the exhibit as was clearly the case here, it cannot be said that the prosecution has established a *prima facie* case under the charge.

[Appeal allowed.]

[**Bahasa Malaysia** Translation of Headnote]

UNDANG-UNDANG KETERANGAN: *Keraguan terhadap identiti eksibit - Rangkaian tindakbalas keterangan tidak memuaskan - Tiada bukti mengenai jumlah berat dadah - Samada digunakan khas untuk diri sendiri - Kewajipan pendakwaan, Akta Dadah Berbahaya 1952, ss. 37(b), (d), (da), 39B(1)a, B(2).*

Perayu disabitkan tuduhan mengedar dadah merbahaya dibawah s. 39B(1)a, Akta Dadah Berbahaya 1952. Hakim perbicaraan puashati bahawa pihak pendakwaan dengan jayanya telah menggunakan anggapan "penghuni" dibawah s. 37(b) Akta Dadah Berbahaya. Yang Arif juga memutuskan bahawa pihak pendakwaan dibolehkan untuk menggunakan s. 37(d). Perayu telah merayu ke Mahkamah Agung.

Diputuskan:

[1] Didapati ada aspek-aspek tertentu dari keterangan yang diberikan itu tidak memuaskan, iaitu:

(a) tidak ada bukti mengenai jumlah berat 10 bungkus dadah yang didapati dalam beg untuk mengisi alat-alat solek kawan wanita perayu. Memandangkan jumlah berat heroin dan morphine dalam kes ini hanya 8.71 gms. lebih dari limitasi statute dibawah s. 37(da)(iiia), jumlah berat 10 bungkus dadah itu amat genting untuk mempertahankan tuduhan terhadap perayu.

(b) rangkaian tindakbalas keterangan eksibit yang merujuk pada dadah itu tidak memuaskan. Tidak ada senarai peperiksaan untuk membantu pihak pendakwaan, walaupun rujukan oleh pegawai penyiasatan PW6 terhadap perkara ini; tambahan pula, didapati perbezaan yang nyata dinyatakan oleh saksi pendakwaan sehubungan dengan jumlah bungkus dadah yang terlibat.

(c) tidak ada bukti yang muktamad bahawa perayu menggunakan bilik secara khusus dimana dadah itu didapati.

(d) Yang Arif Hakim perbicaraan tidak ambil kira keterangan-keterangan, penyewa bilik lain yang juga telah ditahan pada masa yang sama dengan empat bungkus dadah yang didapati di bilik itu.

[2] Memandangkan adanya keraguan ketara terhadap identiti eksibit yang nyata dalam kes ini, tidak boleh diputuskan bahawa pihak pendakwaan telah membuktikan satu kes *prima facie* di bawah tuduhan tersebut.

[Rayuan dibenarkan.]

Cases referred to:

Shamsuddin bin Hassan & Anor. v. PP [1991] 1 CLJ (Rep) 428 ***(foll)***
Abdullah bin Yaacob v. PP [1991] 1 CLJ (Rep) 5 ***(foll)***
Abdul Jalil bin Abdul Satar v. PP [1991] 1 CLJ (Rep) 1 ***(foll)***

Legislation referred to:

Dangerous Drugs Act 1952, ss. 37(b), 37(d), 37(da) (iiia), 39B(1)(a), (2)

For the appellant - Teh Poh Teik (Hira Singh with him); M/s. Abdul Rahman Saad & Associates
For the respondent - Kang Hwee Gee, DPP

JUDGMENT

Hashim Yeop Sani CJ (Malaya):

The appeal was against the conviction and sentence of the appellant under s. 39B(1) (a) and s. 39B(2) of the Dangerous Drugs Act 1952. The charge was that on 14 May 1986 at about 10.50 a.m. at House No. 54-B Jalan Perang Taman Pelangi Johor Bahru the appellant was found with 23.71 grammes of mixed heroin and monoacetyl morphine and thereby raising the statutory presumption of trafficking under the Act.

The facts of the case are fairly straightforward. On the above-stated date and time Insp. Jasbir Singh (PW2) together with three police personnel raided a room at a house stated in the charge. The room was situated at the rear portion of a flat in a three-storey shophouse. On entering the premises the police personnel proceeded straight to the room referred to in the sketch plan as room B. After knocking at the door the appellant opened the door and Insp. Jasbir Singh noticed also a female person sleeping in the said room.

This female person later became the second accused at the trial in the High Court. Insp. Jasbir made a search in the room and found a vanity case placed on top of a plastic cupboard. In this vanity case he found several make-up items and also 10 plastic packets containing substance suspected to be drugs. On a further search of the room the police found two black shoe boxes on the floor. In one shoe box one red plastic bag with 26 small plastic packets containing substances suspected to be drugs were found and also 25 plastic packets containing substances suspected to be drugs. The other shoe box was found to contain candles, a spoon, a pen knife and 117 empty plastic bags. In the plastic cupboard in the room the police party recovered among other things a restricted passport in the name of the appellant. The substance suspected to be drugs was sent to the Chemistry Department and the chemist (PW5) certified that they were 20.28 grammes of heroin and 3.43 grammes of monoacetyle morphine.

To cut the matter short at the close of the prosecution case the trial Judge found that the prosecution had proved a *prima facie* case against the appellant to invoke the presumption under s. 37(b) which provides that a person, until the contrary is proved, shall be deemed to be the occupier of any premises, if he has, or appears to have, the care or management of such premises. The learned Judge held that the prosecution could invoke s. 37(d) which provides that any person who is found to have had in custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug.

As the amount of the drugs involved here is more than 15 grammes the statutory presumption under s. 37(da) (iiia) was also invoked. The trial Judge however acquitted the second accused.

It was also found by the learned Judge that the second accused was the girlfriend of the appellant who visited the appellant occasionally at the flat. Insp. Jasbir Singh also said in evidence that the identity card bearing the name of the second accused was found in the vanity case although this identity card was not tendered in Court. On the day in question the second accused had spent the night with the appellant.

In his defence the appellant denied knowledge of the drugs. He also denied he had exclusive use of the room since his other friends also frequented the room. The appellant stated that he rented room B at the same time as one Yoong Thien Soong who rented room A in the same premises. The appellant also named several other friends (Kenny, Ah Fun, Ah Tuan and Kucing) who frequented his room because he had an air cooler and a mini compo player in his room. These friends also frequented Yoong Thien Soong's room.

It is also in evidence and not challenged that the door knob with lock to room B of the appellant was spoilt and from the photograph (Exh. P2) the door knob in fact was already removed from the door when the appellant moved into room B.

It is also seen from the evidence that the cumulative effect of the evidence adduced would seem to show that the appellant had no exclusive use of room B. This aspect of the evidence would seem also to have troubled the learned Judge and this is reflected in his grounds of judgment at p. 91 where he said:

> Sad to say the investigation relating to the nature of the door to room B was lacking. No pictures were taken of the front side of the door nor were there detail descriptions from PW6 of how the nature of the door and the manner it could be locked from the inside and outside of the room. This leaves all parties baffled and in search of evidence as to how the door could be locked from the outside from the testimonials of other witnesses. This is an important piece of information which was relied on by both prosecution and the defence.

At the latter part in his grounds of judgment the learned trial Judge tried to justify his conclusion that "exclusive right" must be viewed in the light of all circumstances of each particular case. He stressed that:

> It does not mean that once the accused person tendered evidence that some of his friends entered the room with or without his permission it is sufficient evidence to say that the drugs found therein did not belong to the accused and that he has lost his exclusive use of the room.

The totality of the evidence did not support the justification. Firstly it is to be stressed that the burden on the appellant was merely to cast a reasonable doubt on the prosecution case. Where the presumption under s. 37(da) is invoked the burden on the defence was only on the balance of probabilities.

The other aspect of the evidence in this case must be examined. It would seem that the learned trial Judge did not consider the evidence that the said Yoong Thien Soong (tenant of room A) was also arrested at the same time with four packets of drugs found in the room. Although the learned Judge recognised that the evidence relating to the contention that the door to room B could not be locked with the key at the material time yet he did not give sufficient consideration to that evidence. In fact contrary to the evidence the learned trial Judge made a number of speculations to justify his conclusion, namely that the padlock (Exh. P28) could be used to padlock room B, and that the appellant could have purchased another padlock and holding that the air cooler and the mini compo were valuable items and that the shoe boxes were meant for storage of drugs. In fact on the doubt as to exclusive use of room B by the appellant alone could be sufficient ground to allow the appeal. However, there are other aspects of the evidence which are equally unsatisfactory. The most serious flaw in the prosecution case is the evidence relating to the exhibits. The first thing to note is that there was no evidence as to the weight of the ten packets of drugs found in the vanity case of the second accused. A reasonable conclusion must be that the vanity case must have belonged to her because Insp. Jasbir Singh said that her identity card was found in it. Since the total weight of heroin and monoacetyl morphine in the charge was 23.71 grammes, that is, only 8.71 grammes above the statutory limit of s. 37(da) (iiia), the weight of the ten packets of drugs in the vanity case is crucial to sustain the charge against the appellant. The second flaw in the prosecution evidence relating to the exhibits is the chain of evidence relating to the drugs from the time it was discovered up to the time they reached the chemist. There was no search list to assist the prosecution although the reference was made to it by the investigating officer (PW6). ASP K. Govinda (PW6) certified that he sealed three packages. P30 contained 12 packets, P25 contained 10 packets, P31 contained 25 packets and P32 contained 29 packets - totalling 76 packets.

On the number of packets of drugs involved in this case there are the following discrepancies in the evidence:

(1) PW2 (arresting officer) said he recovered a total of 61 packets, that is P13 - 26 packets, P14 - 25 packets and P5 - 10 packets;

(2) PW5 (chemist) said he received a total of 64 packets for analysis made up separately of 10 packets, 25 packets and 29 packets;

(3) PW6 (investigating officer) said in examination in chief that there was a total of 76 packets made up of P30 - 12 packets, P5 - 10 packets, P31 - 25 packets and P32 - 29 packets.

Where there is a serious doubt as to the identity of the exhibit as clearly is the case here it cannot be said that the prosecution has established a *prima facie* case under the charge [*vide Shamsuddin bin Hassan & Anor. v. PP* [1991] 1 CLJ (Rep) 428, *Abdullah bin Yaacob v. PP* [1991] 1 CLJ (Rep) 5, *Abdul Jalil bin Abdul Satar v. PP* [1991] 1 CLJ (Rep) 1.]

We accordingly allowed the appeal and set aside the conviction and sentence against the appellant.

Also found at [1992] 1 CLJ 345